Justice Centre
for Constitutional Freedoms

Preserving Canada's Free Society

Transgenderism, Freedom of Expression and Government Coercion

Submissions on Bill C-16:

An Act to amend the Canadian Human Rights Act

and the Criminal Code

Brief to the Standing Senate Committee on
Legal and Constitutional Affairs

Presented by the

Justice Centre for Constitutional Freedoms

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Introduction: should feelings trump reality?

Trans-black

Rachel Dolezal made headlines in 2015 after she was exposed as a white woman who had been representing herself as black for many years. Ms. Dolezal was fired as head of the Spokane chapter of the NAACP and kicked off a police ombudsman commission when she was outed. She also lost her job teaching African studies at Eastern Washington University.

In her recent memoir "In Full Color: Finding My Place in a Black and White World," she describes identifying as black at a very early age, and the deep emotional bond she formed with her four adopted black siblings. Rachel Dolezal describes the path that led her from being a child of white evangelical parents to an NAACP chapter president and respected educator and activist who identifies as black. Ms. Dolezal claims that race is a social construct: "black is a culture, a philosophy, a political and social view." Comparing herself to Bruce (Caitlyn) Jenner, Ms. Dolezal states "In terms of stigmatized identities, some people will forever see me as my birth category and nothing further. And the same with Caitlyn." Ms. Dolezal has described those who accuse her of lying as "hateful."

Advocating for "racial fluidity," Dolezal claims that "Gender is not binary, it is not even biological, but what strikes me as so odd is that race is not biological either and actually race has been to some extent less biological than gender." "I feel like the idea of being trans-black would be much more accurate than 'I'm white.' Because, you know, I'm not white . . . Calling myself black feels more accurate than saying I'm white."

Ms. Dolezal maintains: "I definitely am not white. Nothing about being white describes who I am." Her Caucasian biological parents "hope and pray for a continual global conversation on the issues of identity and integrity, which will resolve in the recognition that truth is kindness."

Essentially, Ms. Dolezal argues: "I feel black, therefore I am black, and I should be acknowledged by other people as being black." Ms. Dolezal raises the issue of whether reality matters, or ought to matter, and whether one's personal feelings should be given greater weight than reality itself.

Trans-abled

Chloe Jennings-White[1] is very capable and well-accomplished, a research scientist with degrees from Cambridge and Stanford. However, she "knows" she is also a paraplegic, even though fate has dealt her fully functioning legs. She lives in a wheelchair with heavy-duty leg braces and has

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[1] Chloe Jennings-White Wants Operation To Be Permanently Disabled ...
www.huffingtonpost.com/2013/07/19/chloe-jennings-white_n_3625033.html

Body Integrity Identity Disorder has made Chloe Jennings-White, 58 ...
www.dailymail.co.uk/.../Body-Integrity-Identity-Disorder-Chloe-Jennings-White-58-...

always felt this way from earliest memories. She has asked doctors to sever her spinal cord so that her body will finally align with her own understanding of herself.

Body Integrity Identity Disorder (BIID), also known as apotemnophrenia, is a mental illness. Just as gender dysphoria drives the sense that one's body is not right and must be reconstructed, BIID is a curious condition where an individual intensely feels that a particular limb or other section of his or her body does not belong. Like the gender dysphoric person, those desiring amputation will go to extreme lengths to create integrity between their actual body and their self-understanding.

Those suffering from BIID desperately request amputation of a very specific part of the body. Most desire a leg amputation, usually the left leg above the knee. A minority desire an arm removed, most often left side, below the elbow. The transabled "know" their true essence is not just being free of a particular limb, but actually being a disabled person of some sort. Some feel they are truly a blind person, but are living with the unacceptable "burden" of working eyes. For some, it's hearing.

Medical ethics prohibits such amputations. Therefore, many transabled persons resort to maiming the limb so severely that it must be amputated. Clinicians report common means are laying the limb on a railroad track to wait for a passing train, or using power saws. Shotguns, wood chippers, hammers, and chisels have been employed.

Prominent feminists, including Germaine Greer, categorically and unapologetically reject the legitimacy of a male-to-female trans person as an actual woman. Likewise, there are the genuinely disabled who fiercely reject and condemn the transabled as pretenders, regardless of how strong their feelings are. They see no virtue or comradery in the falsely disabled joining the resistance against society's "able-normativity."

Trans-black, trans-abled, and trans-gendered: all three propose that feelings trump reality, or that reality should be altered so as to correspond with feelings and desires. Bill C-16 is a step to imposing this ideology on Canadian society, which would have a serious and harmful impact on *actual* rights and freedoms, such as the freedom of expression and the right of women to safe and secure female-only places such as bathrooms, change-rooms and women's sporting associations.

Compassion's tragic outcome

A 2011 Swedish study,[2] based on long-term follow-up of men and women who underwent gender reassignment surgery, indicates that cutting bodies and administering hormonal treatments are not producing the desired outcomes.

Sweden is considered by many as an example of progressive and enlightened public policy, where sexual and gender differences are commonly accepted. And yet, in contrast to the general

[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3043071/pdf/pone.0016885.pdf

population in Sweden, those who have undergone sex reassignment surgery in that extremely gender-variant country are:

- Three times more likely to die prematurely from any cause.
- Nineteen times more likely to die from suicide.
- Three times more likely to die from cardiovascular disease.
- Three times more likely to require psychiatric hospitalization.
- Two times more likely to engage in substance misuse.
- Two times more likely to commit violent crime.

Of all the health categories the researchers examined, only suffering "any accident" or committing "any crime" were *less* than two times greater than the general population. The scholars conclude: "Even though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found among transsexual persons." Cutting the body does not seem to heal the mind.

Paul R. McHugh[3] directed the Department of Psychiatry and Behavioral Sciences at Johns Hopkins University and was psychiatrist-in-chief at Johns Hopkins Hospital for more than 25 years. He addressed the wisdom of cutting the body to cure the mind in a celebrated essay entitled "Psychiatric Misadventures"[4] in the *American Scholar*. He decries the Manichean "illusion of technique" which assumes "the body is like a suit of clothes to be hemmed and stitched to style" to match the mind, all established on "the ghastliness of the mutilated anatomy."

Dr. McHugh shut down the gender identity clinic at Johns Hopkins, explaining that most of the people who had undergone this type of surgery "had much the same problems with relationships, work, and emotions as before. The hope that they would emerge now from their emotional difficulties to flourish psychologically had not been fulfilled."[5] He has said that medical treatment for transgender youth is "like performing liposuction on an anorexic child."[6]

In a similar vein, one might ask whether a teenage girl suffering from anorexia would be helped by catering to her strong feelings of being overweight, and by encouraging her to continue weighing herself frequently and eating only small amounts of food.

Bill C-16 undermines women's security, privacy and safety

Meghan Murphy, Vancouver writer and author of the Feminist Current[7] blog, has argued before the Standing Senate Committee on Legal and Constitutional Affairs that Bill C-16 misunderstands what gender is, and that treating gender as though it is either internal or a

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[3] https://en.wikipedia.org/wiki/Paul_R._McHugh

[4] http://connection.ebscohost.com/c/articles/9302010143/psychiatric-misadventures

[5] https://www.firstthings.com/article/2004/11/surgical-sex

[6] http://www.foxnews.com/us/2011/10/17/controversial-therapy-for-young-transgender-patients-raises-questions.html

[7] http://www.feministcurrent.com/

personal choice is dangerous. Ms. Murphy has explained that "the idea that gender is something internal, innate, or chosen — expressed through superficial and stereotypical means like hairstyles, clothing, or body language — is deeply regressive. … In our desire to be open-minded and inclusive, we have failed to consider how this move poses a risk to sex-based protections for women and girls."

Ms. Murphy points out that "There is no scientific foundation for the idea that sex is defined by a 'feeling' or by superficial choices. One cannot, in fact, 'feel' like a man or a woman 'on the inside,' because sex is something that simply exists. It is a neutral fact."

Ms. Murphy asks: "If we say that a man is a woman because of something as vague as a "feeling" or because he chooses to take on stereotypically feminine traits, what impact does that have on women's rights and protections? Should he be allowed to apply for positions and grants specifically reserved for women?"

This Committee would be wise to pay heed to Ms. Murphy's testimony:

> Dissolving the categories of "man" and "woman" in order to allow for "fluidity" may sound progressive, but is no more progressive, under the current circumstances, than saying race doesn't exist and that white people don't hold privilege in this world if they don't "feel" white or if they take on racist stereotypes attached to people of colour. If a white person did this, we would rightly call it cooptation and denounce the behavior. Why do we accept that if a man takes on sexist stereotypes traditionally associated with women he magically changes sex and sheds his status as male in this world? The rights of women and girls are being pushed aside to accommodate a trend. Bill C-16 may sound persuasive in its efforts to be open-minded and inclusive, but it rests on very shaky ground.

Women and girls should enjoy a legal right to female-only bathrooms and change-rooms, and arguably do enjoy such a right under section 7 of the *Canadian Charter of Rights and Freedoms*. This right is undermined by legislation such as Bill C-16, which forces public facilities to allow men and boys to access female-only places, thereby jeopardizing women's security, privacy and safety.

The same principle applies to women's associations of all kinds, whether social, cultural, religious, political or in the realm of recreation and sports.

The desire of transgendered individuals to have other people support the "feelings trump reality" ideology should not outweigh the very real interest that women and girls have in maintaining female-only facilities, sports, cultural associations and social activities.

The desires of transgendered individuals can be reasonably accommodated by building gender-neutral individual-stall bathrooms and changing facilities, that are available for all individuals to use. There is no practical need to subject girls and women to violations of privacy and security by allowing males to enter female-only places.
As Ms. Murphy explains it:

"Women's spaces — including homeless shelters, transition houses, washrooms, and change rooms — exist to offer women protection from men. It isn't men who fear that women might enter their locker rooms and flash, harass, assault, abuse, photograph, or kill them. … A man or boy who wishes to identify as a woman or girl, perhaps taking on stereotypically feminine body language, hairstyles, and clothing, is still male. He still has male sex organs, which means girls and women will continue to see him as a threat and feel uncomfortable with his presence in, say, change rooms. Is it now the responsibility of women and girls to leave their own spaces if they feel unsafe? Are teenage girls obligated to overcome material reality lest they be accused of bigotry? Is the onus on women to suddenly forget everything they know and have experienced with regard to sexual violence, sexual harassment, and the male gaze simply because one individual wishes to have access to the female change room? … Women are *still* fighting to have access to women-only spaces (including washrooms and locker rooms) in male-dominated workplaces like fire departments, in order to escape sexual harassment and assault."

Bill C-16 could be harmful to children

The debate on how best to care for children who suffer from gender dysphoria (GD) is far from settled.

Children with GD believe that they are something other than their biological sex. For children experiencing GD before the age of puberty, the confusion is resolved for the vast majority by late adolescence[8]

The American College of Pediatricians[9] opposes normalizing GD as dangerous and unethical. The College states that the use of medicines that block puberty, followed by life-long use of toxic cross-sex hormones, is a combination that results in the sterilization of minors and other significant health risks. The College calls for an end to the normalization of gender dysphoria in children because it has led to the ongoing experimentation upon, and sterilization of, confused children.

Bill C-16, by enshrining one viewpoint in law, serves to stifle healthy scientific and academic debate. This stifling of debate is especially damaging to vulnerable children, who must live with the often irreversible effects of hormone blockers and surgery, when the debate on best approaches is far from settled.

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8 https://www.acpeds.org/the-college-speaks/position-statements/gender-dysphoria-in-children

9 http://www.acpeds.org/the-college-speaks/position-statements/sexuality-issues/gender-identity-issues-in-children-and-adolescents

Bill C-16 imposes mandatory use of gender-neutral pronouns

There can be little doubt that the Canadian Human Rights Commission, based on existing human rights jurisprudence, will compel service-providers and employers to refer to transgender people by their self-chosen pronoun, with legal consequences for those who refuse to use this language. As the Ontario Human Rights Commission explains it:

> Refusing to refer to a trans person by their chosen name and a personal pronoun that matches their gender identity, or purposely misgendering, will likely be discrimination when it takes place in a social area covered by the *Code*, including employment, housing and services like education.[10]

The BC Human Rights Tribunal issued a similar ruling in *Dawson v. Vancouver Police Board*[11] in 2015. This is jurisprudence on which the Canadian Human Rights Commission will rely when issuing its rulings.

Even supporters of Bill C-16, such as University of Toronto law professor Brenda Cossman, admit that "pronoun misuse" can constitute a violation of human rights legislation. By not using someone's preferred pronoun, one could be subjected to fines, damages, termination of employment, ideological re-education in the form of "sensitivity training," or other so-called "remedies."

Therefore, Bill C-16 results in government-imposed coercion on Canadians to use language which expresses approval of, or agreement with, the "feelings trump reality" ideology which underlies this legislation. Bill C-16, if passed, will result in the government forcing people to say and not say certain things, under the threat of penalty.

Bill C-16 (as well as similar provincial laws already in force) mark the first time in Canadian history that citizens are required – on threat of penalty – to use language even if they disagree with it. This is radically different from restricting speech for being hateful, blasphemous or discriminatory. Until now, some laws have said "you cannot say X." But Bill C-16 says "you must say X."

Bill C-16 undermines public discussion, inquiry and debate

One can disagree with the Swedish study that exposes the tragic outcomes suffered by people who have undergone gender-reassignment surgery. One can dismiss the opinions of Dr. Paul McHugh. One can challenge the findings of the American College of Pediatricians.

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[10] http://www.oh rc.on.ca/en/questions-and-answers-about-gender-identity-and-pronouns

[11] https://www.canlii.org/en/bc/bchrt/doc/2013/2013bchrt241/2013bchrt241.html?autocompleteStr=dawson&autocompletePos=4

But even if Dr. McHugh, the College and the Swedish study are dead wrong, the silencing of debate benefits nobody. Science is never settled. Better ideas, better policies and better practices can only emerge through ongoing debate, and a continuous stream of challenges to current thinking and prevailing orthodoxies.

When the law mandates that men who feel like women are entitled to access female-only spaces, that people are legally required to use "gender-neutral" pronouns with which they disagree and that people who use the wrong words when criticizing transgender ideology could face criminal punishment, it becomes very difficult to question politically-driven ideological fashions. For example, the debate over whether it is harmful or beneficial to give children hormone-blocking drugs to delay or stifle puberty is not a debate that should be resolved by legislation.

By enshrining the "feelings trump reality" ideology into law, Bill C-16 will have the effect of chilling honest inquiry, and will stifle evidence-based challenges to reigning orthodoxies.

The more "normalized" and "legitimized" transgenderism becomes through legislation, the larger the chilling effect on discussing the issue, and the more "accommodation" (actually state-enforced ideological agreement) that is demanded by certain vocal and militant members of the transgender community. The demand placed upon Dr. Jordan Peterson at the University of Toronto, that he *must* use the pronouns that transgendered individuals demand, is one example of this.

Bill C-16 undermines the free expression of Canadians

Bill C-16 will add "gender identity or expression" to the list of prohibited grounds for discrimination under the *Canadian Human Rights Act*. Further, the Bill will add "gender identity or expression" to the *Criminal Code* as an additional "identifiable group" which is protected from those advocating genocide (s. 318) and from the public incitement of hatred (s. 319).

The debate regarding transgenderism has only just begun. There is no academic or societal consensus, and it is an area of public policy that has a significant impact on our society. Bill C-16 serves to shut down or at least stifle that debate, by providing legal weight to enforce an ideology.

The greatest danger posed by legislation such as Bill C-16 is the risk of self-censorship, based on a lack of understanding where the line on hate speech is, or based on the fear of being accused of hate speech. This applies to both the *Criminal Code* as well as human right. This chill on speech could prove very harmful to current debates surrounding issues of transgenderism, gender identity and gender expression.

The empty promise of "no jail time"

Arguing in support of Bill C-16, University of Toronto law professor Brenda Cossman[12] states:

> Non-discrimination on the basis of gender identity and expression may very well be interpreted by the courts in the future to include the right to be identified by a person's self identified pronoun. The Ontario Human Rights Commission, for example, in their *Policy on Preventing Discrimination Because of Gender Identity and Expression* states that gender harassment should include "Refusing to refer to a person by their self-identified name and proper personal pronoun." In other words, pronoun misuse may become actionable, though the Human Rights Tribunals and courts. And the remedies? Monetary damages, non-financial remedies (for example, ceasing the discriminatory practice or reinstatement to job) and public interest remedies (for example, changing hiring practices or developing non-discriminatory policies and procedures). Jail time is not one of them.

Professor Cossman's assurance that Canadians won't end up in jail for refusing to use "gender-neutral" pronouns is cold comfort to those who cherish Canada's strong tradition of free expression as a vital component of a healthy democracy.

Anyone can file a human rights complaint, even if frivolous and baseless, without risk of incurring costs or fees. In contrast, the "accused" person will invariably incur large legal bills, not to mention the wasted time and the emotional strain of the human rights prosecution.

Federal and provincial human rights legislation effectively forces the accused person to spend thousands – and often tens of thousands – of dollars in legal costs to defend against a complaint. In addition to this financial threat, Canadians rightfully dread being on the receiving end of a human rights prosecution, by which one can be publicly subjected to detestation and vilification as a "bigot," all in the absence of procedural fairness and the protection of common law rules of evidence.

Perhaps section 319 of the *Criminal Code*, as amended by Bill C-16, will not catch or cover opposition to transgender ideology. But Bill C-16 will immediately have a serious chilling effect on free expression, both academic and non-academic, because most Canadians are eager to obey the law, and take steps to avoid even the possibility of violating the law. The same applies to human rights legislation, which citizens do not wish to run afoul of.

Regarding jail time, section 319(2)(a) of the *Criminal Code* provides for a jail sentence of up to two years.

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[12] http://sds.utoronto.ca/blog/bill-c-16-no-its-not-about-criminalizing-pronoun-misuse/

Prosecutorial discretion is no safeguard

Claims that the Crown Prosecutor and the Canadian Human Rights Commission would not prosecute unreasonably are not the appropriate legal test to use when evaluating legislation.

The question, rather, is what the legislation allows the government to do.

Bill C-16 will allow the Canadian Human Rights Commission to prosecute on the basis of a refusal to use gender-neutral pronouns or other language that may be desired by transgendered individuals. Prosecutions can also result from a refusal or failure to allow males to use female-only spaces and facilities. The Crown is not precluded from prosecuting individuals for expressing opinions which, in the subjective view of the Crown, are deemed to be "hateful" or "extreme."

Extremism, like beauty, is in the eye of the beholder

Less than 50 years ago, sodomy was a *Criminal Code* offense, and advocating for gay marriage would have been considered "extreme." Today, Canadians would think it "extreme" to advocate for the criminalization of sodomy. Extremism, like beauty, is in the eye of the beholder. Neither "hate" nor "extremism" provide an objective legal standard that can be relied upon to protect freedom of expression.

University of Toronto law professor Brenda Cossman, a supporter of Bill C-16, has argued that "The way hate speech has been interpreted by the courts is that it's only applied to very extreme speech," she said. "[The misuse of pronouns] is nowhere close."

Indeed, in 2017 the "misuse" of pronouns might not be seen as "extreme." But support for – and opposition to – same-sex marriage have both been seen as "extreme" *in the past thirty years alone*.

In 2017, expressing opposition to legislation such as Bill C-16, and criticizing the "feelings trump reality" ideology on which C-16 is based, may not be "extreme" enough to constitute hate speech under the *Criminal Code of Canada* now. But ten years from now?

The illusion of a definition of "hate speech"

In 2017, most Canadians would not consider it "hate speech" for someone to express the opinion that males should not use female-only facilities such as bathrooms and locker rooms. But "hate" is a subjective, moving target, which varies from decade to decade, and even from year to year. The internet and social media are replete with examples of opposition to same-sex marriage being denounced as "hateful" and "homophobic," whereas merely 15 years ago such accusations

would have been rare. Nobody is in a position to guarantee that, ten years from now, expressing opposition to the "feelings trump reality" ideology, and to laws and practices which are based on that ideology, will not be considered "hateful."

Even without people being convicted for opposing this ideology and its practice, the chilling effect is dramatic. Adding gender expression and identity will cause the rights of huge numbers of other people to be violated on a regular basis – people's right to freedom of expressions, women's rights to security of the person in the bathroom and change room, women's rights to privacy, and women's rights to equality in sex-segregated sports.

A supreme lack of clarity

Some have suggested that the Supreme Court of Canada has brought clarity about what constitutes "hate speech," in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [*Whatcott*]. The Supreme Court attempted to define "hate" by referring to the word "extreme," but both are entirely subjective. What might sound "hateful" or "extreme" to one person could sound like merely an opinion to someone else, and *vice versa*.

The Court defined "hate speech" to be any expression that "in the view of a reasonable person aware of the context and circumstances, … exposes or tends to expose any person or class of persons to **detestation and vilification** on the basis of a prohibited ground of discrimination [including race, religion, sexual orientation, etc.]."[13]

This definition provides almost no practical guidance as to its application, nor do the Court's definitions of "detestation" and "vilification":

> The legislative prohibition should therefore only apply to expression of an unusual and extreme nature. In my view, "detestation" and "vilification" aptly describe the harmful effect that the *Code* seeks to eliminate. Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims.[14]

Whether an opinion exposes people to "detestation" or "vilification" is, like "hate" and "extremism," in the eye of the beholder, or in the ear of the listener.

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[13] *Whatcott SCC* at para 95 [emphasis added]. "Gender Identity" and "Gender Expression" are now "prohibited grounds" of discrimination.
[14] *Ibid* at paras 40-41.

For example, one could listen to a particularly virulent and polemic denunciation of the Israeli policy of building settlements on the West Bank, and conclude – or not – that this attack subjects Israelis (or Jews) to "detestation" and "vilification."

In visual terms, the same goes for equating the Jewish Star of David with the swastika used by the National Socialists in Germany in the 1920s and through to 1945; this could be viewed as "extreme" or "hateful" speech, or not. Nobody knows with certainty whether a "swastika = Star of David" sign at a political rally would violate the *Criminal Code*, human rights legislation, or both, or neither.

A necessary amendment

Bill C-16 should be rejected for the reasons set out above.

If the Senate chooses to pass this legislation, it should be amended to say that no person, by reason of their refusal to make use of gender-neutral pronouns or other trans-specific language, shall be guilty of an offence. Further, no person, by virtue of their reasoned criticism of transgender ideology, their religious beliefs, or their principled opposition to policy based on transgender ideology, should be guilty of an offense.

However, this Committee should bear in mind that such amendments will not mitigate the harmful effects of this legislation on women and girls whose right to safe female-only places will be violated by this new law. Further, such amendment will only partially reduce the chilling effect that this legislation will have on free expression.

Conclusion

Bill C-16 is legislation that is based on the feelings of certain people who self-identify as something that is different from their biological reality. Obviously, these people need to be cared for, and treated with respect and dignity, but that objective is not accomplished by harming the rights and freedoms of everybody else.

Bill C-16 pretends to protect transgender people, but in reality it diminishes the freedom of Canadians and gives the government more power, even the power to compel citizens to violate their conscience by saying things they know to be false. Further, it harms the privacy rights of girls and women, and needlessly puts girls' and women's safety and sexual integrity at risk.